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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-921

NEWPORT ASSOCIATES, INC.,

Petitioner,

against

SHELDON H. SOLOW,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondent's brief resorts to three devices to oppose the petition. First, a letter from a Mr. Dennis is submitted as an appendix to Respondent's brief. This letter was also submitted as an appendix to Respondent's brief in the Court of Appeals. It should be noted that the letter is not a part of the record and indeed bears a date well after the date upon which the record in this case was made. In fact, the letter is dated during that period of time between which the Appellate Division of the Supreme Court of New York State reversed the lower Court's finding for the Respondent and the time when the Respondent's appeal to the New York Court of Appeals was heard. The letter was evidently obtained for that purpose. Petitioner first learned of such letter when it appeared in Respondent's brief submitted shortly before the hearing in the Court of Appeals.

It should be noted that despite this letter both opinions of the judges in the Court of Appeals state quite plainly that the Petitioner here has been "excluded" from use of the FAR. Mr. Dennis appears to state otherwise in his

letter; Petitioner urges that Mr. Dennis, an engineer, can scarcely be relied upon for legal expertise which contradicts the judges of New York's highest court.

Secondly, in an attempt to avoid the obvious retroactive effect of the statute as interpreted in this case, the Respondent stated (footnote page 2) that under the Zoning Law in effect prior to 1960 a lessee was "deemed" to be an owner for zoning purposes. While possibly technically true, this bald statement is a deception. Prior to Section 12-10 of the Zoning Resolution of 1960, the Respondent would not have been permitted to do what he has done in this case. At that time the Zoning Law did not need to deal with, or distinguish between, an owner and a lessee, for the restriction was on the building itself and not on the person constructing the building. The right to consider two zoning lots a single lot for the purposes of restriction was controlled not by the nature of the person occupying the premises, but by a determination that the building, unbuilt to its maximum on one zoning lot, was an "accessory" to the building on another zoning lot. *Matter of Brause (Murdock)*, New York Law Journal, Dec. 5, 1958, Page 13, Columns 5 and 6 (N. Y. Co. Sup. Ct. 1958).

An "accessory" building upon one zoning lot, for the purposes of the Resolution, was one structurally related to the building on the adjacent zoning lot. Thus, it was true a long-term lessee might be permitted to combine two zoning lots if he so structurally altered the leased building that it became an "accessory" to the building he proposed to build on the adjoining plot. That situation did not exist at the time this lease was executed, nor could it now exist; the lease entered into for the subject premises prohibited the lessee (Respondent) from making structural changes to the building. It was only with the passage of the Zoning Resolution of 1960 that the right to combine zoning lots was based on ownership rather than upon the nature of the buildings situated or to be situated on the plots; but the issue remains, may the legislative body be

deemed to have intended such change in the law to be retroactive in its effect on private contract rights.

The issue raised by the Respondent truly should focus on the distinction between the power of a Court to set forth at a later date an interpretation of the law as of the date upon which a contract was executed and the power of the legislature to change the law. The change of the law by a legislature purporting to affect the rights of parties to a contract already in existence is prohibited, but is here sought to be presented by the Respondent as the same nature of act as a court's retrospective interpretation of prior law.

Respondent's third approach is a form of circle reasoning, demonstrated in the footnote on page 3 of the Respondent's brief herein. The Respondent urges that the Petitioner lost no rights for, says the Respondent, during the term of the lease it was the lessee only who had the rights. But it is this very issue which is sought to be brought before the Court. Through the operation of the statute in question, the State has enabled the Respondent to use a right never granted or contemplated in the lease, to the exclusion of the Petitioner. The fact is, that both opinions in the Court of Appeals clearly indicate that that is the precise ruling the Court of Appeals was making. It is that interpretation of the statute and the statute so interpreted which Petitioner seeks to bring for review before this Court.

That ruling and that interpretation of the statute has resulted in the taking of property from, and to the exclusion of, the Petitioner by the Respondent with the assistance of the State.

Respectfully submitted,

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